Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

No. 98-1033

In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, AND JERRY AMUSSEN,

Petitioners,

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON AND HAGANS & SYDOW,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT CLYDE WILSON'S BRIEF IN OPPOSITION

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27pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the appellate court's action in striking petitioners' points of error on appeal a death penalty sanction which must meet the test of *Societe Internationale v. Rogers*, 357 U.S. 197 (1958)? If so, did the court err in finding petitioners waived points of error after petitioners filed an inadequate brief, requested and were granted leave to file an amended brief, and subsequently filed an amended brief which contained points of error having little or no cites to the appellate record?

2. Can a litigant be subject to death penalty sanctions when petitioners filed an inadequate brief, requested and were granted leave to file an amended brief, and subsequently file an amended brief containing points of error having little or no cites to the appellate record even though the documents petitioners claim were needed were included in the appellate record on file at the time petitioners' amended brief was filed?

3. Is Texas Rule of Appellate Procedure 74(f) so vague as to result in the violation of a litigant's rights to due process and equal protection under the law?

4. Does the Seventh Amendment guarantee a state court litigant the right to trial by jury so as to preclude summary judgment where no genuine issue of material fact continues to exist?

5. Where a summary judgment is reviewed on appeal "de novo," does the state appellate court's failure to review the record in the light most favorable to the non-movant, constitute a violation of a litigant's Seventh Amendment right to trial by jury?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings are as follows:

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Respondent Wilson's motion for summary judgment was granted by the 157th District Court in Harris County, Texas. A final judgment was entered on November 23, 1994, when summary judgment was granted for the only remaining defendant. The Fourteenth Court of Appeals of Texas affirmed summary judgment in favor of Wilson on May 29, 1997. The Supreme Court of Texas denied petitioners' petition for review on April 9, 1998. The Supreme Court of Texas denied petitioners' motion for rehearing of petition for review on July 30, 1998.

OBJECTION TO JURISDICTION

This Court lacks jurisdiction to review petitioners' claims under 28 U.S.C. § 1257. Petitioners have failed to meet their burden of showing the constitutional issues were properly presented to the Supreme Court of Texas. *See Adams v. Robertson*, 520 U.S. 83 (1997).

STATEMENT OF CASE

Wilson Seeks and Is Granted Summary Judgment. Clyde Wilson filed a motion for summary judgment, three supplements to this motion, and numerous exhibits attached thereto. Summary judgment was granted in favor of Wilson on April 18, 1994. Tr. 902.

Petitioners' Appeal. A final judgment in this case was entered on November 23, 1994, granting summary judgment for the only remaining defendant. Petitioners

filed their appeal bond and perfected their appeal on February 21, 1995. The original transcript containing four volumes was filed on March 22, 1995. After being granted four extensions totaling over 210 days, the petitioners filed their brief on October 12, 1995. Wilson filed his reply brief on February 8, 1996. All respondents argued in their briefs that petitioners had waived any argument and specifically identified the inadequacy of the record and deficiencies in petitioners' brief.

On March 4, 1996, petitioners moved for leave to file a supplemental transcript to include additional materials in the transcript. The Fourteenth Court of Appeals of Texas granted the motion, and stated that re-briefing would not be permitted. Petitioners filed a motion for extension of time and reconsideration of the re-briefing decision. The Fourteenth Court of Appeals of Texas granted the extension of time on April 25, 1996, and allowed plaintiffs to amend their brief with transcript references. On May 20, 1996, petitioners filed a second motion for extension of time to file the supplemental transcript. The Fourteenth Court of Appeals of Texas granted petitioners' motion, giving them until June 21, 1996 to supplement the transcript.

On June 21, 1996, petitioners filed their Amended Brief of Appellants, along with the First and Second Supplemental Transcripts (eight volumes total). On July 19, 1996, Petitioners again moved for leave to supplement the transcript. The Fourteenth Court of Appeals of Texas granted the motion on July 25, 1996, giving Petitioners until August 19, 1996 to file a supplemental transcript. The Third Supplemental Transcript was filed on August 19, 1996 (four volumes).

Summary Judgment Affirmed. The Fourteenth Court of Appeals of Texas affirmed summary judgment in favor of Respondent Wilson. Petitioners' Appendix A. The Court of Appeals found that all causes of action pertaining to Respondent Wilson were waived as petitioners failed to provide an adequate brief, even after being given the opportunity to supplement the transcript and file an amended brief. The Court of Appeals found that because the "amended brief did not remedy the inadequacies of the first" petitioners had waived all their summary judgment claims as to Respondent Wilson. Petitioners' Appendix A at *4-5. The Court of Appeals also held that petitioners waived their constitutional complaints by failing to raise them in the trial court. Petitioners' Appendix A at 6-8. The petitioners filed a Petition for Review with the Texas Supreme Court which was denied, and a motion for rehearing which was also denied by the Texas Supreme Court. Petitioners' Appendix B, C.

REASONS FOR DENYING THE WRIT

This Court Lacks Jurisdiction Under 28 U.S.C. § 1257.

This Court may not consider petitioners' points of error as they have failed to rebut the presumption that these issues were not presented to the Texas Supreme Court. In *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028 (1997), this Court held: "With 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered

the decision we have been asked to review." *Adams*, 117 S.Ct. at 1029 (citations omitted). Pursuant to 28 U.S.C. § 1257, the only decision this Court can review is that of the highest court in the state, that being the Texas Supreme Court. As noted in petitioners' brief, the Texas Supreme Court denied their petition for review without opinion. (Petitioners' Brief at 2; appendix B to Petitioners' Brief). When the highest state court is silent on a federal question before this Court, it is assumed the issue was not properly presented and the aggrieved party has the burden of defeating that presumption. *Adams*, 520 U.S. at ___, 117 S.Ct. at 1029. Petitioners have failed to even attempt to rebut this presumption. As such, this Court is without jurisdiction to hear these matters.

Petitioners' False Premises

Petitioners' points of error are based on several premises which are false. Respondent Wilson will first address these misstatements made in petitioners' brief. Petitioners misstate the background facts in that they falsely accuse the district clerk of playing a role in their failure to cite to the record, and also misstate the Court of Appeals' reasoning for finding petitioners had waived certain points of error.

The District Clerk Played No Part In Petitioners' Failure To Provide An Adequate Brief

The first false premise proffered by Petitioners is that the district clerk had any responsibility for petitioners' utter failure to cite to the appellate record in their state court brief. In fact, petitioners' non-compliance with the

Texas Rules of Appellate Procedure was willful, solely the fault of petitioners, and demonstrates the contempt shown to the judicial system by these petitioners. Petitioners contend "[i]t was through no fault of Petitioners' counsel that the file was not properly maintained and, therefore, not available to properly cite on appeal." (Petitioners' Brief at 7). Petitioners also argue "[a]lthough she later got the right to amend one time in June, that was still at a time before the district clerk had completed his preparation of the supplemental transcript." (Petitioners' Brief at 8). Petitioners mislead the Court by failing to disclose that there was an appellate record on appeal to which petitioners could have cited, but simply chose not to do so. *Every single cite* to the third supplemental transcript in petitioners' proposed second amended brief cites to a document which was also contained in one of the transcripts already on file.

Petitioners Were Given Two Bites At The Apple To Comply With Briefing Requirements

Appendix A is a chart that cross references every cite to the Third Supplemental Transcript in petitioners' proposed second amended brief with a cite to one of the volumes available when the petitioners filed their first amended brief. There is not a single cite to a document that did not already exist. The documents cited by petitioners in the Third Supplemental Transcript were superflous. Therefore, despite petitioners' argument to the contrary, the district clerk played no part whatsoever in their failure to provide cites to the appellate record in their amended brief. Petitioners' failure is even more egregious in light of the fact that waiver of error occurred

after respondents had **specifically** pointed out the shortcomings of petitioners' original brief, and **after** petitioners were granted leave to file an amended brief.

Petitioners Fail To Correctly State Why The Court Of Appeals Found Waiver

Secondly, petitioners falsely argue "[t]he Court of Appeals' sole complaint was that the number of cites to the transcript (35) was insufficient under the circumstances." (Petitioners' brief at 12). This is not the case. The Court of Appeals did not judge the brief as a whole, rather analyzed it piece by piece. Although petitioners would have this Court believe the Court of Appeals' only complaint was the total number of cites, in reality the Court of Appeals stated:

> In the twenty page section of appellants' brief that attacks the summary judgments granted as to appellants' causes of action, they provide little additional reference to the record. Appellants divided this section into eight subsections, based on various causes of action. Five of these subsections (discussing claims of abuse of process, breach of the attorney-client relationship, intentional infliction of emotional distress, negligent misrepresentation and negligence per se) contain no citations to the appellate record whatsoever. Another subsection, discussing appellants' claims of civil conspiracy, contains only a single citation to the record – the same letter cited in the general statement of facts. Still another subsection, addressing claims of tortious interference with contract, fails to cite any legal authority.

(Petitioners' Appendix A at *3).

This excerpt shows the magnitude of petitioners' willful noncompliance with the Texas Rules of Appellate Procedure. The court of appeals found petitioners waived their points of error for their failure to comply with the rules of appellate procedure.

I. Petitioners Were Not Deprived Any Due Process Rights

In point one petitioners argue their due process rights were deprived when the Court of Appeals found they had waived their points of error on appeal. (Petitioners' Brief at 14). No due process rights were denied. The Court of Appeals was justified in finding petitioners waived their points of error because petitioners wholly failed to either cite to the appellate record or provide legal authority in their brief as required by law. *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909) involved a failure by the defendant to produce material evidence in its possession. 212 U.S. at 350. This resulted in the state court striking defendant's answer and entering a default judgment. This Court held:

> In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

Hammond Packing Co., 212 U.S. at 351. In the case at bar, petitioners were specifically informed that their brief was inadequate as it failed to cite to the appellate record. Even though petitioners were given ample opportunity to file an amended brief, they still submitted a brief with

points of error completely devoid of a single cite to the appellate record. (Petitioners' Appendix A at *3). Another point of error found to be waived was completely devoid of any legal authority. (Petitioners' Appendix A at *3). Just as in *Hammond,* in the case at bar the preservation of due process was secured by the presumption that the refusal to cite to authority in the appellate record or legal authority was an admission of the want of merit in the asserted point of error.

Cases Cited By Petitioners Are Not Controlling

Petitioners' reliance on *Societe Internationale Pour Participation Industrielles et Commerciales v. Rogers,* 357 U.S. 197 (1958) is misplaced. (Petitioners' Brief at 14-15). In *Societe,* Swiss penal laws limited petitioner's ability to satisfy the pretrial production order because of criminal sanctions to which those producing the records would have been exposed. This Court held that Federal Rule of Civil Procedure 37 should not be construed to authorize dismissal of a complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply was due to petitioner's inability to produce the records, and not to willfulness, bad faith, or any fault of petitioner. *Societe Internationale v. Rogers,* 357 U.S. at 211-212. "Petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control." *Id.* Petitioners have failed to establish that their failure to comply with the briefing order of the court of appeals and the Texas Rules of Civil Procedure was caused by anything other than Petitioners' own conduct.

Petitioners cite *Inpetco, Inc. v. Texas American Bank*, 729 S.W.2d 300 (Tex. 1987) as precedent for appellate court leniency without informing this Court that the Texas Supreme Court has specifically limited the holding of that case. (Petitioners' brief at 23). The Texas Supreme Court reiterated the discretion of a Texas appellate court to affirm a judgment based on waiver of error by inadequate briefing as violative of the Texas Rules of Appellate Procedure in *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988), and in *Fredonia State Bank v. American Life Ins.*, 881 S.W.2d 279 (Tex. 1994). In *Fredonia*, the Court held:

> [T]he principal underlying the opinion in *Davis* is the settled rule that an appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing, and that whether that discretion has been properly exercised depends on the facts of the case. . . . Despite its broad language, *Inpetco* should not be read as overruling or modifying prior cases holding that error may be waived by inadequate briefing. . . .

Fredonia State Bank, 881 S.W.2d at 284. As such, *Inpetco* does not require a court to order rebriefing. Error may be waived by inadequate briefing. *Fredonia*, 881 S.W.2d at 284. Petitioners' same argument was put forth in *Happy Harbor Methodist Home, Inc. v. Cowins*, 903 S.W.2d 884 (Tex.App. – Houston [1st Dist.] 1995, no writ). The court held "Happy Harbor's reliance on *Inpetco* is misplaced. As the supreme court clarified in *Fredonia State Bank v. American Life Ins.*, 881 S.W.2d 279, 284 (Tex. 1994), 'an appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing.' " *Happy Harbor*, 903 S.W.2d at 887.

While the appellant in *Inpetco* did not have an opportunity to re-brief, Petitioners were given ample opportunity to amend their brief. The Fourteenth Court of Appeals of Texas was absolutely correct and fully within its discretion in holding that petitioners had waived any error through briefing deficiencies.

II. Petitioners Were Not Denied Fifth And Fourteenth Amendment Rights To Due Process

In point of error two, petitioners argue the Court of Appeals denied them due process rights under the Fifth and Fourteenth Amendments when it found petitioners waived certain points of error. Petitioners contend this "death penalty" sanction was due to a violation caused by the District Clerk. (Petitioners' Brief at 24).

Issue Not Raised In State Court

The issue presented to this Court, whether death penalty sanctions can be levied when the violation was due in part by the breach of a public official, was never presented to the state court. While petitioners did argue death penalty sanctions should not have been levied, the issue of whether these penalties may be imposed when a public official breaches his duty was neither raised nor argued to the state court. As such, this Court may not hear this claim.

No Death Penalty Sanctions

No "death penalty" sanctions were applied to Petitioners' appeal. The appellate court found that, after multiple opportunities to supplement the record and even after a chance to *amend* their brief, petitioners wilfully disregarded the Texas Rules of Appellate Procedure by failing to support their contentions with adequate record citations. (Petitioners' Appendix A at *3). This constituted a voluntary waiver. Waiver is the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. BLACK'S LAW DICTIONARY 1580 (6th ed. 1990). At this point, the appellate court was fully within its discretion in holding petitioners had waived those unsupported points. (Petitioners' Appendix A at *2); *see also* TEX.R.APP.P. 74(f), (o), (p) (currently TEX.R.APP.P. 38.1(d), (f), (h); 38.9(a)), and *Fredonia State Bank v. General American Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994). Petitioners' failure to comply with requisite appellate rules was not due to petitioners' inability, but rather resulted from petitioners' willfulness, bad faith, and was solely the fault of petitioners.

No Blame Rests With Clerk

Additionally, as fully explained, *supra*, it was entirely the fault of petitioners, and no fault of the District Clerk, that petitioners' amended brief contained points of error devoid of any cites to either the appellate record or to legal authority. Petitioners' second point of error is premised on the fact the district clerk was to blame for their

inadequate brief. As this premise is false, this Court must deny this point of error.

III. Petitioners' Vagueness Argument Fails

In point of error three petitioners argue that Texas Rule of Appellate Procedure 74(f) is unconstitutionally vague. (Petitioners' Brief at 26). Petitioners' claim fails for several reasons.

Petitioners Failed To Properly Present This Claim To State Court

A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). In *Bankers*, this Court found the petitioner's claim was not properly presented. *Id.* at 78. This was because petitioners failed to identify the Excessive Fines Clause, the Eighth Amendment, or the Federal Constitution in general. *Id.* at 77. Petitioners' claim of vagueness fails for similar reasons. Petitioners' argument to the Texas Supreme Court stated: "To the extent Petitioners' conduct, under these facts, was deemed to be so flagrant as to bypass rebriefing and warrant what was, in essence, death penalty sanctions, then Petitioners contend that the term "flagrant" as used in Rule 74 is vague and ambiguous and fails to provide adequate notice to the appellants or to the appellate courts so that uniform application of this standard will be applied." Petitioners failed to cite to the United States Constitution or to due process in general. This fails to

meet the minimal requirement that a federal claim was presented. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *see also Webb v. Webb*, 451 U.S. 493, 496-97 (1981) (reference to "full faith and credit" in state court proceedings failed to raise a federal constitutional claim even though the State Constitution contained no full faith and credit clause). In fact, petitioners' first allegation that Texas Rule of Appellate Procedure 74(f) violated their right to due process under the Fifth and Fourteenth Amendment of the United States Constitution appeared in their Petition for Writ of Certiorari. (Petitioners' Brief at 28). Accordingly, this Court does not have jurisdiction to hear this issue.

Vagueness Argument Defeated By Actual Knowledge

Petitioners' argument is defeated because they had notice their conduct would put them at risk. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), this Court held that "[o]bjections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know their conduct was at risk." *Id.* at 361. Petitioners' knowledge that their actions constituted waiver overcomes any vagueness argument. Petitioners were specifically informed of the inadequacies of their original brief, and all respondents argued that such failures amounted to a waiver of the issues since petitioners did not include the required parenthetical reference to the page in the record where the matter complained of is to be found. Tex. R. App. P. 74(d) . Respondents specifically referenced Texas case law which held that such a failure constituted waiver. *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549

(Tex.App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.) (finding point of error waived for failure to refer to error in record under predecessor rule TEX. R. CIV. P. 418(e)). After being put on notice that their failure to follow the Texas Rules of Appellate Procedure would result in a waiver of their points of error, petitioners asked for and were granted leave to file an amended brief. Although petitioners were specifically informed that Tex.R.App.P. 74(f) required them to cite to the appellate record, and despite the fact petitioners were specifically made aware of Texas cases which held failure to do so amounted to waiver, petitioners filed an amended brief having points of error which either failed to cite to the record or failed to cite any legal authority. Petitioners were given actual notice of the consequences of their actions, defeating any vagueness argument.

Petitioners have cited no authority to support their argument that briefing requirements such as those in the Texas Rules of Appellate Procedure are unconstitutionally vague. This is sufficient reason for this Court to deny the petition.

Petitioners Admit Minimum Guidelines Present

The legislature must provide minimal guidance to prevent a statute from being vague. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Petitioners admit in their brief that "[i]t is only within Rules 74(o), 74(p) and 83 of the Texas Rules of Appellate Procedure that one finds guidance as to the appropriate actions of an appellate court when faced with what they consider to be inadequate briefing." (Petitioners' Brief at 27). As petitioners

admit there are guidelines found in the Texas Rules of Appellate Procedure, their vagueness argument fails.

IV. Petitioners Were Not Denied Trial By Jury Under The Seventh Amendment

In points of error four and five, petitioners argue they were denied the right to a trial by jury under the Seventh Amendment. (Petitioners' Brief at 28). This argument also fails for several reasons.

Waiver Of Constitutional Argument Affirmed On Independent State Ground

Points four and five of petitioners' brief may not be considered by this Court as they were affirmed by an independent state ground, namely that petitioners waived their argument for failing to raise it in the trial court. (Petitioners' Appendix A at *5) (holding that the failure to present a claim, even a claim of constitutional magnitude, at the trial court level waives that claim.). This Court lacks jurisdiction to hear an issue if a state court's resolution of an issue of federal law rests on an adequate and independent state ground. *Sochor v. Florida*, 504 U.S. 525, 533 (1992). In *Sochor*, the state court found the constitutional issue regarding a jury instruction was waived because it was not raised in the trial court. *Id.* at 534. This Court held that the state court's rejection was based on the alternative state ground that the claim was not preserved for appeal. *Id.* Thus, this Court was without authority to address this issue. *Id.* Because the court of appeals held that petitioners waived this constitutional

issue since it was not raised in the trial court, this issue may not be addressed in this forum.

Seventh Amendment Does Not Apply To States

The Seventh Amendment right to a trial by jury is inapplicable to a suit in state court. In *Walker v. Sauvinet*, 92 U.S. 90 (1875), a case decided over 100 years ago, this Court decided this issue, holding that the Seventh Amendment relates only to trials in the courts of the United States. *Id.* at 92. A state, without violating the requirements of due process, may provide such a rule for its own courts, and may do away with the jury altogether. *Herron v. Southern Pac. Co.*, 283 U.S. 91, 93 (1931). More recently, this Court in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336-37 (1979) held that summary judgment does not violate the Seventh Amendment. *See also Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate the Seventh Amendment). The Seventh Amendment "has not been made binding on the states . . . " 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2301, at 14 & n.14 (3rd ed. 1995), citing *Chicago, Rock Island & Pac. Ry. Co. v. Cole*, 251 U.S. 54, 56 (1919). Several Texas state court cases have rejected petitioners' argument that a summary judgment denies a party his constitutional right to a trial by jury. *See Carraba v. Employers Casualty Co.*, 742 S.W.2d 709 (Tex.App. – Houston [14th Dist.] 1987, no writ); *Mills v. Rice*, 441 S.W.2d 290 (Tex.Civ.App. – El Paso 1969, no writ); *Swafford v. Holman*, 446 S.W.2d 75 (Tex.Civ.App. – Dallas 1969, writ ref'd n.r.e.); *Wyche v. Works*, 373 S.W.2d 558, 561 (Tex.Civ.App. – Dallas 1962, writ ref'd n.r.e.). Petitioners' trial by jury due process argument is without merit.

Additionally, even if the Seventh Amendment did apply to the states, which it does not, petitioners have completely failed to alert this Court to the alleged genuine issue of material fact which they argue existed at the trial level. Before arguing they were denied a trial by jury because summary judgment was granted while genuine issues of material fact existed, petitioners must first set forth the alleged fact issues. This they did not do. Petitioners would have this Court simply take it on faith that there were genuine issues of material fact, without putting forth any evidence of such issues. As such, this petition must be denied.

CONCLUSION

For the foregoing reasons, and the opinion of the Texas Court of Appeals, the petition for writ of certiorari should be denied.

DATED: January 28, 1999.

Respectfully submitted,

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APPENDIX A

In this exhibit, "Tr.-1" would mean volume one of the original transcript. "2nd Supp. Tr.-1" would mean volume one of the second supplemental transcript.

Reference to Third Supplemental Transcript	Cross Reference to Same Document
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